IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CEDAR RAPIDS DIVISION

TERESA L. MERCER, Plaintiff, vs. CITY OF CEDAR RAPIDS and WILLIAM J. BYRNE, Defendants.	No. C98-143MWB **MEMORANDUM OPINION AND ORDER REGARDING DEFENDANTS' RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW AND, ALTERNATIVELY, MOTION FOR NEW TRIAL**

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In the wake of a well-tried slander case, the court is called upon to resolve the pending post-trial motions filed by defendants. Specifically, the court resolves the defendants' motions for judgment as a matter of law and new trial.

I. INTRODUCTION AND BACKGROUND

Plaintiff Teresa L. Mercer ("Mercer") filed suit against two defendants, the City of Cedar Rapids ("the City") and William J. Byrne ("Chief Byrne"), the former Cedar Rapids Chief of Police. Mercer claimed that Chief Byrne slandered her by making two statements to THE CEDAR RAPIDS GAZETTE newspaper concerning her discharge as a probationary police officer with the Cedar Rapids Police Department. Specifically, Mercer alleged that Chief Byrne made the following two slanderous statements: (1) that plaintiff did not "meet up" with the standards for a Cedar Rapids Police Officer; and (2) that the off-duty relationship between Captain Peters and Mercer "adversely affect[ed] the workplace." This case was tried for four days before a jury beginning on November 14, 2000, in Cedar Rapids, Iowa. On November 21, 2000, the jury returned a verdict in favor of Mercer, finding Chief Byrne's statement that Mercer did not "meet up" with the standards for a Cedar Rapids police officer was slanderous and awarded her actual damages in the total amount of $48,000.00. The actual damages consisted of $5,000.00 for damages to Mercer's reputation, $23,000.00 for lost wages, and $20,000.00 for past pain and suffering. On November 20, 2000, the Clerk of Court entered judgment.

On November 30, 2000, defendants filed a Renewed Motion for Judgment as a Matter of Law and, Alternatively, Motion for New Trial, pursuant to Rules 50 and 59 of the Federal Rules of Civil Procedure. Defendants base their motion for judgment as a matter of law on the following grounds: (1) there was insufficient evidence in the record to permit a reasonable jury to find that either or both statements were slanderous; (2) there was

insufficient evidence in the record to permit a reasonable jury to conclude that either statement was made with actual malice; (3) the defendants produced more than sufficient evidence to establish the truth of the statements that were alleged to be slanderous; (4) that the statements were generic and not specifically directed to the plaintiff; (5) there is insufficient evidence supporting the award of damages, and the specific elements of damages submitted to the jury should not have been submitted as a matter of law; (6) the court allowed prejudicial, extraneous, and irrelevant material to be presented to the jury; (7) the court erred by not submitting the instruction on actual malice propounded by the defendants and submitted to the court pursuant to the court's pre-trial order; and (8) the court should have determined as a matter of law that all the elements of the qualified privilege were established. Thus, defendants are seeking an entry of judgment as a matter of law in their favor, thereby setting aside the jury's verdict. Only in the alternative are the defendants requesting a new trial. On December 12, 2000, plaintiff Mercer resisted these motions.

The court heard oral arguments on these post-trial motions on January 10, 2001. Plaintiff Mercer was represented by Mark J. Seidl of Seidl & Chicchelly, Marion, Iowa. Defendants the City and Chief Byrne were represented by Mohammad H. Sheronick of the Office of City Attorney, Cedar Rapids, Iowa. With this background in mind, the court turns to its consideration of the pending motions.

II. LEGAL ANALYSIS

A. Motion For Judgment As A Matter Of Law

1. Applicable standards

The standards for a motion for judgment as a matter of law are outlined in Rule 50 of the Federal Rules of Civil Procedure. In pertinent part, Rule 50 provides:

> **(a) Judgment as a Matter of Law.**

> **(1)** If during the trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.
>
> **(2)** Motions for judgment as a matter of law may be made at any time before the submission of the case to the jury. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.
>
> **(b) Renewing Motion for Judgment After Trial; Alternative Motion for New Trial.** If, for any reason, the court does not grant a motion for judgment as a matter of law made at the close of all the evidence, the court is considered to have submitted the action to jury subject to the court's later deciding the legal questions raised by the motion. The movant may renew its request for judgment as a matter of law by filing a motion no later than 10 days after entry of judgment—and may alternatively request a new trial or join a motion for a new trial under Rule 59. In ruling on a renewed motion, the court may:
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> **(1)** if a verdict was returned:
>
> **(A)** allow the judgment to stand,
>
> **(B)** order a new trial, or
>
> **(C)** direct entry of judgment as a matter of law; or
>
> **(2)** if no verdict was returned;
>
> **(A)** order a new trial, or
>
> **(B)** direct entry of judgment as a matter of law.

FED R. CIV. P. 50(a)-(b).

The Eighth Circuit Court of Appeals reiterated the standards to be applied by the district court—as well as the appellate court—in determining a motion for judgment as a matter of law:

> When the motion seeks judgment on the ground of insufficiency

> of the evidence, the question is a legal one. *Hathaway v. Runyon*, 132 F.3d 1214, 1220 (8th Cir. 1997); *Jarvis v. Sauer Sundstrand Co.*, 116 F.3d 321, 324 (8th Cir. 1997). A jury verdict must be affirmed "'unless, viewing the evidence in the light most favorable to the prevailing party, we conclude that a reasonable jury could have not found for that party.'" *Stockmen's Livestock Mkt., Inc. [v. Norwest Bank of Sioux City*], 135 F.3d 1236, 1240-41 (8th Cir. 1998) (quoting *Chicago Title Ins. Co. v. Resolution Trust Corp.*, 53 F.3d 899, 904 (8th Cir. 1995)).

Cross v. Cleaver, 142 F.3d 1059, 1066 (8th Cir. 1998); *accord Reeves v. Sanderson Plumbing Products, Inc.*, ___U.S.___, 120 S. Ct. 2097, 2109 (2000) (stating that under Rule 50, a court should render judgment as a matter of law when "a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.") (citations omitted). Thus, this standard requires the court to:

> "[C]onsider the evidence in the light most favorable to the prevailing party, assume that the jury resolved all conflicts of evidence in favor of that party, assume as true all facts which the prevailing party's evidence tended to prove, give the prevailing party the benefit of all favorable inferences which may reasonably be drawn from the facts, and deny the motion, if in light of the foregoing, reasonable jurors could differ as to the conclusion that could be drawn from the evidence."

Minneapolis Community Dev. Agency v. Lake Calhoun Assoc., 928 F.2d 299, 301 (8th Cir. 1991) (quoting *Atlas Pile Driving Co. v. DiCon Fin. Co.*, 886 F.2d 986, 989 (8th Cir. 1989)); *see also Stephens v. Johnson*, 83 F.3d 198, 200 (8th Cir. 1996) (citing *Whitnack v. Douglas County*, 16 F.3d 954, 956 (8th Cir. 1994), in turn, quoting *Hasting v. Boston Mut. Life Ins. Co.*, 975 F.2d 506, 509 (8th Cir. 1992)); *Haynes v. Bee-Line Trucking Co.*, 80 F.3d 1235, 1238 (8th Cir. 1996); *Nelson v. Boatmen's Bancshares, Inc.*, 26 F.3d 796, 800 (8th Cir. 1994) (reiterating these factors, citing *White v. Pence*, 961 F.2d 776, 779 (8th Cir. 1992); *McAnally v. Gildersleeve*, 16 F.3d 1493, 1500 (8th Cir. 1994) (same).

This standard for consideration of a motion for judgment as a matter of law accords the jury's verdict substantial deference. *Tilson v. Forrest City Police Dep't*, 28 F.3d 802, 806 (8th Cir. 1994), *cert. denied*, 514 U.S. 1004 (1995); *McAnally*, 16 F.3d at 1500. However, even with this deference to the jury's verdict, the jury cannot be accorded "the benefit of unreasonable inferences, or those 'at war with the undisputed facts,'" *McAnally*, 16 F.3d at 1500 (quoting *City of Omaha Employees Betterment Ass'n v. City of Omaha*, 883 F.2d 650, 651 (8th Cir. 1989), in turn, quoting *Marcoux v. Van Wyk*, 572 F.2d 651, 653 (8th Cir.), *cert. dismissed*, 439 U.S. 801 (1978)), but the court must still defer to the jury's resolution of conflicting testimony. *Jackson v. Virginia*, 443 U.S. 307, 326 (1979).

Having reviewed the applicable standards, the court turns to an examination of the grounds raised by defendants in their motion for judgment as a matter of law to determine whether post-trial relief from the jury's verdict against the defendants is appropriate.

2. Sufficiency of the Evidence

a. Nature of the statements

The defendants contend that there is insufficient evidence to support a jury finding that either statement was slanderous. Defendants contend that the statements were not directed specifically at Mercer and that Chief Byrne was not referring to Mercer when he uttered the statements. Defendants emphasize that both Chief Byrne and Gazette reporter Rick Smith were in agreement that the statements were innocuous, generic, and unrelated to Mercer. Thus, defendants argue that for the jury to have found either or both statements to be slanderous, let alone one to be slanderous *per se*, demonstrates that the jury was guided more by prejudice, sympathy, bias and passion. In response, Mercer contends that the conversation between Smith and Chief Byrne could only be considered generic if it had occurred outside the context of Mercer's firing. For example, Mercer highlights the following parts of Smith's testimony: Smith called Chief Byrne about Mercer's firing;

Smith was surprised when Chief Byrne spoke to him at all, because public officials almost always decline to comment on personal matters; and Smith could not have run the story that appeared in the Gazette without Chief Byrne's confirmation. Thus, Mercer argues that the conversation between Smith and Chief Byrne was not a disinterested and incidental chat; rather, Mercer argues that Chief Byrne described Mercer to Smith at least inferentially, if not explicitly, as a person who did not "meet up." Moreover, Mercer contends that if Byrne had not meant to damage her reputation, he could have declined to comment, or at least stopped at confirming her firing.

As this court concluded in its summary judgment decision, whether or not the statements in this case can reasonably be understood as defamatory *per se* or even defamatory at all presented a jury question. *See Mercer v. City of Cedar Rapids*, 104 F. Supp. 2d 1130, 1171-72 & 1181 (N.D. Iowa 2000). This was so because the court found that, in the context of the complete newspaper story, there were reasonable inferences that Chief Byrne's comments specifically related to Mercer. *Id.* However, the court also noted that the statements did not unambiguously target Mercer, or unambiguously identify her as incompetent, because the statements were cast in general terms. *Id.* Thus, because the statements could have two reasonable constructions, the court determined that the procedure outlined in *Kerndt v. Rolling Hills Nat'l Bank*, 558 N.W. 2d 410, 418 (Iowa 1997) should be followed, whereby the jury would be required to determine whether (1) one or both of the statements were reasonably understood as defamatory *per se*; (2) one or both of the statements were understood as defamatory, but not defamatory *per se* (the jury must then determine whether the plaintiff has shown malice, falsity, and damage); or (3) the statements were not understood as defamatory. *Id.* According to the verdict, the jury found that the statement that Mercer did not "meet up" with the standards for a Cedar Rapids Police Officer was slanderous, but not slanderous *per se*, and that the statement that the off-duty relationship between Captain Peters and Mercer "adversely affect[ed] the workplace"

was slanderous *per se*.

The jury was presented with the March 14, 1998, article, with the headline "Officer loses job; had relationship with co-worker," that appeared in THE CEDAR RAPIDS GAZETTE concerning Teresa Mercer's discharge. The article stated, in pertinent part, as follows:

> Veteran Cedar Rapids police Capt. Phil Peters got a lateral reassignment in January from the command job he loved.
>
> On Friday, the probationary female officer with whom he had an off-duty relationship that attracted the police chief's concern lost her job.
>
> Police Chief Bud Byrne last night downplayed officer Teresa Mercer's dismissal, saying it is not uncommon for a member of the probationary class to lose the job in the year before a permanent assignment begins.
>
> The probationary year, which for Mercer was to have ended in a few days, gives the department and the officer a chance to see if police work is right for the officer, Byrne said.
>
> "And so it's not an unusual thing to find people who just don't meet up," Byrne said.
>
> * * *
>
> Byrne has not publicly detailed what he objected to about the relationship between Peters and Mercer other than to say any off-duty relationship that "adversely affects the workplace has to be addressed."

See Exhibit No. 1. The court finds that, in the context of the entire newspaper article, and in light of the evidence presented at trial, there were inferences from which a reasonable jury could conclude that those statements by Chief Byrne were directed at Mercer. Merely because Smith and Chief Byrne were in agreement that the statements in this article were innocuous, generic, and unrelated to Mercer does not make them so. This is especially true when the following portions of Smith's testimony are taken into account, namely, that he called Chief Byrne with the intention of learning about the circumstances surrounding Mercer's firing, and that despite knowing the reason for Smith's call, Chief Byrne, to Smith's surprise, proceeded to converse with him. A reasonable jury could have inferred

that when Chief Byrne responded to Smith's call, which was specifically about Mercer, and proceeded to talk about members of the probationary class of the Cedar Rapids police department, of which Mercer was a part, Chief Byrne grouped Mercer, at least inferentially, with those members of the probationary class that "don't meet up." Thus, the court agrees with Mercer's argument that a reasonable jury could have determined that while not perhaps talking directly about Mercer, Chief Byrne's statements describe Mercer inferentially, if not explicitly, as a person who does not "meet up." Additionally, the court points out that a reasonable jury could have determined that Chief Byrne's statements were directed at Mercer because the language "don't meet up" that appears in the newspaper article also appears in Mercer's termination letter signed by Chief Byrne, to wit: "It is my determination that you do not meet the standards required of a police officer in the Cedar Rapids Police Department." *See* Plaintiff's Exhibit No. 5.

With respect to Chief Byrne's statement that any off-duty relationship that "adversely affects the workplace," the court finds that a reasonable jury could have concluded that this statement was in reference to Mercer and Captain Peters's relationship based on the article itself, as well as evidence in the record that reflects the occasions in which Chief Byrne spoke with both Mercer and Peters about their relationship. Therefore, viewing the evidence in the light most favorable to Mercer, as it must in considering the pending motion for judgment as a matter of law, *see Cross*, 142 F.3d at 1066, the court concludes that sufficient evidence was presented at trial to support the jury's finding regarding the nature of the statements. Therefore, defendants' request for judgment as a matter of law on this ground must be denied.

b. Findings of actual malice

Defendants contend that, as matter of law, actual malice was not proven. Specifically, defendants contend that the evidence shows that at the time the statements were made Chief Byrne was speaking what he believed was the truth, in an attempt to

protect Mercer, and in such a manner as to say as little as possible to the news reporter. Defendants contend that Smith's testimony that he didn't know why Mercer was fired, that Chief Byrne was not talking about Mercer and that Chief Byrne was not malicious belie any rational finding that Chief Byrne spoke with actual malice to Smith about the situation. Furthermore, defendants contend that Chief Byrne's statements were not facts, but instead were opinions protected by the First Amendment. In response, Mercer contends that actual malice was proven, because there was an abundant showing of reckless disregard, sufficient to amount to circumstantial knowledge of falsehood. Mercer contends that the record is replete with evidence that contradicts any statement that she did not measure up, and that she lacked competence or moral character. Additionally, Mercer points out that there was sufficient evidence upon which to base a finding of conscious ill will entirely apart from reckless disregard. This is so because Mercer asserts that it is quite likely that the catalyst, which may have inflamed Chief Byrne, stemmed from an editorial in the Iowa Tactical Officers Association ("ITOA") newsletter that Chief Byrne admitted made him angry.

In the summary judgment decision, *see Mercer*, 104 F. Supp. 2d at 1169-70, the court explained the definition of "actual malice" in this case, whereby the court created a single definition of actual malice that incorporated both "qualified privilege" and "public figure" defamation. Specifically, at the trial, the court instructed the jury with respect to actual malice as follows:

> To show "actual malice," there must be an intent to inflict harm through falsehood. Therefore, a statement is made with "actual malice" if it is made with knowledge that it is false or with reckless disregard for its truth or falsity. A "reckless disregard for truth or falsity" means that the speaker had a high degree of awareness of probable falsity of the statement. Consequently, a "reckless disregard for truth or falsity" may be established where there are obvious reasons to doubt the truth of the statement itself or the information on

> which the statement was based, but the statement was made anyway.

See Final Jury Instruction No. 5 & 6. The court finds that there was evidence in the record such that a reasonable jury could conclude that Chief Byrne's statements were made with the requisite actual malice. *See Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 668 (1989) (stating that a plaintiff is entitled to prove actual malice by circumstantial evidence). The court highlights four points in the record to support its finding. First, the court finds that a reasonable jury could have inferred that Chief Byrne was, at a minimum, offended by Mercer's refusal to pay heed to his advice with respect to not frequenting bars. The following colloquy between Chief Byrne and his attorney, Mohammad Sheronick, is illustrative:

> Q: One of the other things that you testified to on your direct examination was your conversations with officer—captain Peters and officer Mercer, in which you urged them to stay out of bars. Now, in this modern enlightened age, how would you respond to me telling you that you should not impose your whatever your views are on drinking upon other grown adults?
>
> A: This—I realize that I could not necessarily order them to. What I was giving them was a piece of advice from my years of experience, and problems that I had seen develop in years passed, and it was sort of a friendly advice situation. To show you the difference how things over the years, when I came on the department, if the chief of police had told me what I told Terry, there's no way in God's green Earth that I would have ever gone in a bar.
>
> Q: Why is that?
>
> A: Because I wanted to be a police office. And what that chief said was the law. I wasn't going to fight the chief and try to prove that I had—I could—I could tell him what to do or I could show him or put him in his place. I would have done what he said.
>
> Q: Now, did the fact that neither captain Peters nor officer Mercer apparently did what you said, did that make you mad?

> A: Not mad.
> Q: What did that make you?
> A: Disappointed in the fact that, you know, I thought Phil and I had a good relationship over the years, and I didn't know of any bad relationship with Terry. So I thought, you know, by offering them a little fatherly advice, so to speak, they would, especially in light of the fact that Terry told me that she got my message loud and clear, I thought this is done. It's over with, I'm not going to have to worry about this again.

Tr. 93-94 (day 3)[1] (emphasis added). The court finds that a reasonable jury could have inferred from Chief Byrne's testimony that he was more than "disappointed" with Mercer, because she rebuffed his advice that he deemed "was the law." Indeed, Chief Byrne was emphatic that had the chief of police given him the same advice that he gave Mercer while he was a probationary officer "there's no way in God's green Earth that I would have ever gone in a bar." This voluntary comment evinces, or a least a reasonable jury could infer, a sense of outrage on the part of Chief Byrne towards Mercer for her failure to pay heed to his advice, thereby "fight[ing] the chief" and "putt[ing] him in his place." Therefore, the court finds that a reasonable jury could infer actual malice based on Chief Byrne's testimony that is outlined above.

Second, the court finds that a reasonable jury could infer that Chief Byrne acted with actual malice in light of Peters and Mercer speaking to Commissioner Nancy Evans. Ms. Evans was the Public Safety Commissioner in charge of both the fire and police departments, and thus was Chief Byrne's supervisor. Captain Peters testified that he initiated the conversation with Ms. Evans because he felt that he was being improperly investigated, and that he requested that Mercer be present during the conversation. Peters

[1]For purposes of this opinion, the court refers to the real-time transcript in the case, which is comprised of four trial dates. Thus, the parenthetical (day 3) refers to the day of the trial.

further testified that he wrote a memo to Chief Byrne explaining the meeting that he had with Ms. Evans. The memo also indicated that Mercer attended this meeting. Thus, the court finds that a reasonable jury could have inferred that Chief Byrne was angered by the fact that both Mercer and Peters went "over his head," without his knowledge, to talk to his supervisor about how he was handling matters that occurred in his police department.

Third, the court finds that a reasonable jury could infer that Chief Byrne acted with actual malice in light of the editorial, entitled "ITOA Board Member and Staff Instructor Under Attack," that appeared in the ITOA newsletter dated January of 1998. During the trial, the court gave a limiting instruction with respect to this editorial, instructing the jury that it "is admitted not for the purposes of establishing the truth of any of the matters discussed therein, but only on the question of whether or not it caused offense to police [C]hief William J Byrne." *See* Tr. at 1 (day 2). The court finds that the following colloquy between Chief Byrne and Mercer's attorney is insightful:

> Q: And how did you feel when you saw that ITOA newsletter editorial?
>
> A: Unhappy.
>
> Q: Were you a little angry?
>
> A: Yeah, I would have to say I was angry.
>
> Q: And were you angry at Terry Mercer and Phil Peters?
>
> A: No, I was not angry. I was, again, I would say disappointed in them, but not angry with them. I was angry with the article and the way it was written. In police work, you're taught very early on that there's two sides to every story. This gentleman was a lieutenant or is a lieutenant in law enforcement in the Polk County sheriff's, and didn't even have the common courtesy to call me and get my side of the story. It was just there it is, and he blasted, in my opinion the Cedar Rapids Police Department, the City of Cedar Rapids, and I thought that this is something his superior, sheriff Rice, would like to know about, because if the tables were turned, I would want one of my officers writing such a piece for a statewide

publication.

Tr. 51-52 (day 3). The court is hard pressed to understand how Chief Byrne would be angry with the ITOA editorial, and yet only disappointed in Mercer and Peters for having spoken with the author of the editorial. A reasonable juror could have inferred that Chief Byrne was equally angry with Peters and Mercer for having presumably provided the fodder that appeared in the editorial that "blasted the Cedar Rapids Police Department," a department that not only he took tremendous pride in, but according to Chief Byrne, one for which "the citizens of Cedar Rapids have a very high regard." *See* Tr. at 91 (day 3). Additionally, examples of some of the remarks about Chief Byrne that appear in the editorial include: "Politics appear to be alive and well within the Cedar Rapids Police Department due to recent actions by Police Chief William J. Byrne. Information received by the ITOA reveals that the chief has launched a personal attack against Captain Phil Peters. . . ."; "But the police chief, for reasons known only to himself, has taken exception to the pair's off-duty activities."; "Cedar Rapids has many outstanding officers within its ranks and it's a shame that they have to suffer for the actions of a few irresponsible 'leaders.' This is sure to give the department a black eye for some time to come." *See* Plaintiff's Exhibit No. 8. A reasonable jury could have certainly been convinced that the statements contained in this widely disseminated newsletter did cause offense to Chief Byrne at a personal level. Therefore, the court finds that a reasonable jury could have determined that this editorial that appeared in the ITOA newsletter did, indeed, cause offense to Chief Byrne.

Fourth, and related to the colloquy detailed above, the court notes that if it had been the trier of fact, it would have concluded that Chief Byrne's routine use of the word "disappointed/disappointment" to describe his feelings toward Mercer was really a code word for anger. Therefore, the court finds that a reasonable jury could have inferred that Chief Byrne's feelings of disappointment were actually feelings of anger. As the trier of fact, the jury was in the superior position to evaluate the demeanor of Chief Byrne when he

testified about his "disappointment" with Mercer, and therefore, the court will not interfere with its reasonable finding that Chief Byrne acted with actual malice.

c. Protected expressions of idea

Furthermore, defendants contend that Chief Byrne's statements were not factual claims, but instead were opinions protected by the First Amendment. The Eighth Circuit Court of Appeals explained that in the context of the First Amendment, whether a statement is one of fact or opinion is a question of law to be decided by the court. *Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1305 n. 7 (8th Cir.) (en banc), cert. denied, 479 U.S. 883 (1986); *accord Jones v. Palmer Communications, Inc.*, 440 N.W. 2d 884, 891 (Iowa 1989) (citing *Janklow*, 788 F.2d at 1302-03) (setting forth the four factors used to distinguish between protected expressions of idea and actionable assertions of fact). In *Lundell Mfg. v. American Broadcasting Companies*, 98 F. 3d 351, (8th Cir. 1996), the Eighth Circuit Court of Appeals explained:

> For example, in *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990), the Supreme Court rejected the argument that opinions are absolutely protected by the First Amendment, *id.* at 18-19, recognizing that "expressions of 'opinion' may often imply an assertion of objective fact." *Id.* at 18. The Court allowed the defamation action to go forward, ruling that a reasonable trier of fact could find that the so-called opinion could be interpreted as a false assertion of fact. *Id.* at 21. Had the Court believed it must independently decide whether a statement constituted a false statement of fact, the Court would not have used this inquiry. *Accord Partington v. Bugliosi*, 56 F.3d 1147, 1153 (9th Cir. 1995) (standard for summary judgment is whether a reasonable factfinder could conclude that the statements imply a false assertion of objective fact).

Id. at 358-59. The *Lundell* court further stated that "[t]he question of whether there has been any intrusion on First Amendment principles is seemingly subsumed in the inquiry as to whether there is substantial evidence to support the jury's findings as to falsity and

substantial truth." *Id.* at 359; *see Norse v. Henry Holt & Co.*, 991 F.2d 563, 567 (9th Cir. 1993) (summary judgment for author appropriate when no reasonable jury could understand the statement, when read in context, to be defamatory); *Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union, Local 655*, 39 F.3d 191, 195-96 (8th Cir. 1994) (summary judgment for union appropriate when its statements could not reasonably be read to be false assertions of fact).

Here, because there was a jury question as to whether Chief Byrne's statements were slanderous, slanderous *per se*, or not slanderous as all, there necessarily was a jury question as to whether Chief Byrne's statements were reasonably capable of a defamatory meaning, that is whether they "impl[ied] an assertion of fact," *see id.*, that was false. *See Kerndt*, 558 N.W. 2d at 418 (explaining that a plaintiff alleging defamation ordinarily must prove that the statements at issue were made with malice, were false, and caused damage). Based on the evidence in the record, the court finds that a reasonable jury could have concluded that Chief Byrne's statements were false assertions of fact. Consequently, the court will not interfere with the jury's finding that Chief Byrne's statements were defamatory, and thus, not opinions protected by the First Amendment.

d. Defense of truth

In the alternative to their position that the statements that form the basis of this lawsuit are not slanderous, defendants contend that they proved the truth of both statements. Specifically, defendants contend that the record is replete with evidence showing how Mercer did not "meet up" as an officer. For example, defendants assert that Mercer's own witnesses at best spoke of a mixed perception of her skills as an officer. Moreover, defendants contend that the record shows numerous specific examples of how the off duty conduct of Mercer adversely affected the workplace. In response, Mercer contends that several evaluations, the testimony of two captains and two field training officers and Mercer's own testimony demonstrated her competence. Mercer argues that the evidence

provided by co-officers with direct observation of Mercer's abilities is far more probative that the statements made by Chief Byrne. The court agrees.

First, the court notes that the jury concluded that the defendants were successful in proving the truth of the statement that the off-duty relationship between Captain Peters and Mercer "adversely affected the workplace." Thus, the defendants' defense of truth argument regarding this statement is moot. With respect to the other statement that the plaintiff did not "meet up" with the standards for a Cedar Rapids Police Officer, the court finds that there was sufficient evidence in the record to support the jury's verdict that the defendants did not prove that this statement was true or substantially true by the greater weight of the evidence. This is so because there was testimony from Captain Peters (Tr. at 26-28, day 2), Captain James J. Noonan (Tr. at 79, 82, day 2), police officer Charles Fields (Tr. at 104, day 2), police officer Scott Syverson (Tr. at 113, day 2), and police officer Jeff Faircloth (Tr. at 130, day 2) indicating that Mercer was, in fact, competent. Therefore, viewing the evidence in the light most favorable to Mercer, as it must in considering the pending motion for judgment as a matter of law, *see Cross*, 142 F.3d at 1066, the court concludes that sufficient evidence was presented at trial to support the jury's finding that the defendants did not prove the statement that Mercer did not "meet up" with the standards of a Cedar Rapids Police Officer, was true or substantially true by the greater weight of the evidence. Therefore, defendants' request for judgment as a matter of law on this claim must also be denied.

e. Damages

Defendants contend that Mercer failed to offer evidence of damage to her reputation and that she failed to offer any evidence of injury to reputation. Accordingly, defendants contend that because Mercer has not established entitlement to recover damages for injury to her reputation, she is not allowed to recover any other "parasitic" damages such as lost wages and pain and suffering either. For this proposition, defendants cite to *Schlegel v.*

Ottumwa Courier, 585 N.W. 2d 217, 223 (Iowa 1990). Defendants also contend that Mercer offered no evidence of causation that linked the comments attributed to Chief Byrne to her failure to be hired for a law enforcement position. In response, Mercer contends that she established damage to her reputation in light of the evidence adduced at trial that for over two years there was no offer of employment as a police officer in her county. She also points out that her husband's former supervisor stated that the comments such as those made in the Gazette by Chief Byrne would dissuade a law enforcement agency from considering Mercer for employment.

The defendants are correct in stating that in order to prove damages to reputation Mercer must prove both that such damages should be awarded and the amount of the damages to be awarded. *Wilson v. IBP, Inc.*, 558 N.W. 2d 132, 140 (Iowa 1996), *cert. denied,* 522 U.S. 810 (1997). In the case of statements that are not libelous *per se* but libelous *per quod*, Iowa law requires that a "plaintiff must first prove actual damage to reputation before the plaintiff can recover for mental anguish or hurt feelings." *Schlegel v. Ottumwa Courier*, 585 N.W. 2d 217, 222 (Iowa 1998); *Johnson v. Nickerson*, 542 N.W. 2d 506, 513 (Iowa 1996) (stating that "[t]o recover in an action for defamation, a plaintiff must ordinarily prove some sort of cognizable injury, such as injury to reputation"). Moreover, to prove damages, the jury must "be presented with evidence upon which the consequences of the [slander] can be judged, evidence such as the nature of the plaintiff's reputation before the [slander] was published and the extent of the publication." *Wilson*, 558 N.W. 2d at 140 (citations omitted). Thus, evidence of Mercer's prior reputation is only useful in determining the amount of damages awarded, not whether they should be awarded as a matter of law. *See Wilson*, 558 N.W. 2d at 140.

There was evidence in the record that Mercer was not hired because of Chief Byrne's statements, which suggested to perspective employers that her reputation was of concern. Mike Richmond, who is a division manager for the Department of Correctional Services of

the Sixth Judicial District, testified that the article would have a negative impact on someone's reputation and that a perspective employer would be affected by it. Specifically, Mr. Richmond testified that when he read the article, he interpreted it to mean that Mercer couldn't do her job at the Cedar Rapids Police Department. *See* Tr. 153 (day 2). He also testified that he would not want to hire Mercer as a police officer in his police department knowing that she had failed the probation of another police department. He said, *inter alia*, "if you fail to make probation in a police department, I guess it would be common sense to question whether she'd make it in another department, another police department." *Id.* at 154.

Moreover, there was evidence in the record that Mercer's reputation before Chief Byrne's statements were published in the Gazette was that she was a good police officer. As stated earlier, testimony from Captain Peters (Tr. at 26-28, day 2), Captain James J. Noonan (Tr. at 79, 82, day 2), police officer Charles Fields (Tr. at 104, day 2), police officer Scott Syverson (Tr. at 113, day 2), and police officer Jeff Faircloth (Tr. at 130, day 2) indicated that Mercer had a reputation as a good police officer. However, after Chief Byrne's statements were published in the Gazette, her employment opportunities as a law enforcement officer were all but foreclosed because her reputation was of concern. Captain Peters testified that, after her discharge and publication of the article, when Mercer made efforts to obtain other employment as a police officer in Marion, Iowa City, Johnson County Sheriff's Department, and the Mount Vernon Police Department she was unsuccessful. *See* Tr. at 28-29 (day 2). Mercer also testified that she sought employment as a police officer to no avail in Marion, the Johnson County Sheriff's Department, the Black Hawk County Sheriff's Department, the Mount Vernon Police Department, and the Lisbon Police Department. *See* Tr. at 127 (day 1). Although she did state that she was offered employment at the Iowa City Police Department, such offer was not until August or September of 2000, which was two years after the article in the Gazette was published, and

Mercer testified that she had to decline the offer because as a single mother she was unable to obtain day-care during the shifts that she would have been expected to work. *Id*. at 128.

Viewing the evidence in the light most favorable to the plaintiff, the court finds that there was sufficient evidence presented that Mercer did, indeed, prove damages to reputation. Accordingly, because the court finds that Mercer did establish entitlement to recover for damages to reputation, she is allowed to recover other "parasitic" damages such as lost wages and pain and suffering. *See Schlegel*, 585 N.W. 2d at 223. As demonstrated above, Mercer was unable to secure employment as a police officer. Even though, for nearly two years, Mercer attempted to mitigate her damages, she was not able to recoup the lost wages until she found employment as a realtor. Mercer presented evidence as to the amount of money that she lost during that time period. In so doing, the court finds that there was sufficient evidence in the record to support the jury's award of lost wages.

Additionally, with respect to the damages for past pain and suffering, Mercer testified that as a result of the article, she has been ignored, shunned or given the "cold shoulder" by her former colleagues of the Cedar Rapids Police Department. *Id*. at 125-26 (day 1). She further testified that as a result of the article, she suffered from severe migraines, which necessitated visits to the hospital, lost approximately twenty (20) pounds, and cried all the time. *Id*. at 133-34. When asked what effects the publication of the article in the Gazette had on Mercer, Captain Peters testified that for months she was "extremely depressed, crying quite a bit." *See* Tr. at 28 (day 2). Thus, the court finds that there was sufficient evidence in the record for the jury to award damages for Mercer's past pain and suffering. *See Lara v. Thomas*, 512 N.W. 2d 777, 786 (Iowa 1994) (allowing recovery of damages for "emotional distress and resulting bodily harm").

3. Jury Instructions on Actual Malice

Defendants contend that the instruction for actual malice, which is outlined above, was inaccurate. Defendants assert that they submitted their proposed instruction that

accurately sets forth both forms of "actual malice" that Mercer had to prove, inasmuch as Mercer was a public figure and the court determined that the qualified privilege was available to Chief Byrne. Defendants contend that not submitting the instruction requested by them on actual malice was prejudicial in that the jury was not apprized of the state of law; the jury was not adequately and accurately informed of the definitions of actual malice; and the jury was not apprized of the high standard and quantum of proof necessary to establish actual malice. In response, Mercer states that the jury was properly instructed on actual malice.

This court explained and clarified in great detail in its summary judgment opinion, *see Mercer*, 104 F. Supp. 2d at 1169-70, the proof necessary to show actual malice under Iowa law in the circumstances specific to this case.[2] Therefore, the court will not repeat its explanation here. Suffice is to say that the court concludes that the jury was properly instructed on actual malice. *See Cross v. Cleaver*, 142 F.3d 1059, 1067 (8th Cir. 1998) (citing *Ryther v. KARE 11*, 108 F.3d 832, 846 (8th Cir. 1997) (en banc) (citations omitted)) (stating that the trial court has broad discretion in instructing the jury).

4. Admission of Evidence

Defendants contend that they were prejudiced by the admission of irrelevant, extraneous and collateral evidence that confused and misled the jury and resulted in a verdict premised upon passion, prejudice and confusion. For example, the defendants argue that all of the evidence regarding other relationships between police officers was irrelevant, confusing and prejudicial. The court disagrees.

Initially, the court notes that the defendants' claim that this court adopted a liberal standard of admission of evidence may in large part be due to the fact that they objected to

[2]Additionally, the court sent letters to counsel explaining the court's rationale for the jury instructions. These letters are included in an appendix to this order.

the admissibility of every piece of evidence that was identified in the Pre-trial Order, even including business records generated by their own clients, as well as the testimony of virtually every witness called by the plaintiff in her case in chief. Notwithstanding, the court finds that the evidence regarding the other relationships between police officers in the Cedar Rapids Police Department was directly relevant as to whether Chief Byrne's statement that, Mercer did not "meet up" with the standards for a Cedar Rapids police officer, was or was not true. *See* FED. R. EIVD. 401 ("Relevant evidence means any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence ."). Therefore, the court finds that admission of the evidence during trial was not irrelevant, extraneous or collateral.

5. Defense of Qualified Privilege

Defendants contend that all the elements of the qualified privilege were met and that Mercer failed in carrying her burden of proving by clear and convincing evidence that Chief Byrne acted with actual malice. Therefore, defendants argue that since the privilege is lost on proof of actual malice, and since there is no evidence in the record to support the finding by the jury that Chief Byrne acted with actual malice, the court should hold, as a matter of law, that the qualified privilege was established as a matter of law. The court disagrees.

As noted by the defendants, if a plaintiff proves the defamatory statement was made with actual malice the privilege will not apply. *See Mercer*, 104 F. Supp. 2d at 1169-70. As the court determined earlier, however, there was sufficient evidence in the record that Chief Byrne did, in fact, act with actual malice. Accordingly, the court finds that defendants' privilege does not apply here because the jury determined that Chief Byrne's statements were made with actual malice.

In sum, the court concludes that there is sufficient evidence in the trial record to support the jury's finding with respect to the nature of the statements, and actual malice.

The court also finds that there is sufficient evidence in the trial record to support the jury's finding that the statements were defamatory and, thus, not protected by the First Amendment, and that defendants failed to prove the truth of the statement that plaintiff did not "meet up." The court also finds that there is sufficient evidence in the record to sustain the award for damages to Mercer's reputation, lost wages and past pain and suffering. The court further finds that the jury was properly instructed on actual malice, that the admission of evidence during the trial was not irrelevant, extraneous or collateral and that the defendants did not establish their defense of qualified privilege, as a matter of law, since it was lost on the jury's finding of actual malice. Therefore, defendants' motion for judgment as a matter of law is **denied**.

B. Motion For New Trial

Federal Rule of Civil Procedure 59, entitled "New Trials; Amendment of Judgments," states, in relevant part, as follows:

> **(a) GROUNDS**. A new trial may be granted to all or any of the parties and on all or part of the issues (1) in an action in which there has been a trial by jury, for any of the reasons for which new trials have heretofore been granted in actions at law in the courts in the United States . . . .

FED. R. CIV. P. 59(a). Regarding motions for new trial under Federal Rule of Civil Procedure 59, the court in *White v. Pence*, 961 F.2d 776 (8th Cir. 1992) observed:

> With respect to motions for new trial on the question of whether the verdict is against the weight of the evidence, we have stated: "In determining whether a verdict is against the weight of the evidence, the trial court can rely on its own reading of the evidence—it can 'weigh the evidence, disbelieve witnesses, and grant a new trial even where there is substantial evidence to sustain a verdict.'" *Ryan v. McDonough Power Equip.*, 734 F.2d 385, 387 (8th Cir. 1984) (citation omitted). Similar language appears in *Brown*, 755 F.2d at 671-73; *Slatton [v.*

> *Martin K. Eby Constr. Co.]*, 506 F.2d [505], 508 n.4 [(8th Cir. 1974), *cert. denied*, 421 U.S. 931 (1975)]; *Bates [v. Hensley]*, 414 F.2d [1006], 1011 [(8th Cir. 1969)], and early authority cited in *Bates*. *See also Leichihman v. Pickwick Int'l*, 814 F.2d 1263, 1266 (8th Cir.), *cert. denied*, 484 U.S. 855 (1987). These cases establish the fundamental process or methodology to be applied by the district court in considering new trial motions and are in contrast to those procedures governing motions for j.n.o.v.

Id. at 780. Thus, the court in *Pence* concluded the district court may grant a new trial on the basis that the verdict is against the weight of the evidence, if the first trial results in a miscarriage of justice. *Id.*; *see also Ogden v. WaxWorks, Inc.*, 214 F.3d 999, 1010 (8th Cir. 2000) (stating that a motion for new trial should only be granted if the jury's verdict was against the great weight of the evidence so a to constitute a miscarriage of justice) (citation omitted); *Shaffer v. Wilkes*, 65 F.3d 115, 117 (8th Cir. 1995) (citing *Pence* for this standard); *Nelson*, 26 F.3d at 800 (stating "[a] motion for new trial should be granted if, after weighing the evidence, a district court concludes that the jury's verdict amounts to a miscarriage of justice."); *Jacobs Mfg. Co. v. Sam Brown Co.*, 19 F.3d 1259, 1266 (8th Cir.) (observing that the correct standard for new trial is the conclusion that "the [jury's] verdict was against the 'great weight' of the evidence, so that granting a new trial would prevent a miscarriage of justice."), *cert. denied*, 513 U.S. 989 (1994).

In support of their alternative motion for new trial, defendants re-assert the same arguments they asserted in their motion for judgment as a matter of law. The court previously examined these arguments under its analysis of defendants' motion for judgment as a matter of law, and concluded that the arguments did not sufficiently support granting such a motion. Similarly, because the jury's verdict does not weigh against the 'great weight' of the evidence, the court concludes that the jury's verdict does not amount to a miscarriage of justice. Therefore, defendants' motion for a new trial is also **denied**.

III. CONCLUSION

The court has considered each of the grounds raised in defendants' motion for judgment as a matter of law, and concludes that the motion must be **denied**. Likewise, the court has considered the grounds raised in defendants' alternative motion for new trial, and finds that this motion must also be **denied**.

One final point. This case was zealously and very well-tried by counsel on both sides. Throughout the pre-trial, jury trial, and post-trial phases counsel demonstrated the highest level of professionalism and civility to each other, the parties, the witnesses, and the court. Mr. Seidl and Mr. Sheronick once again prove that the highest standards of professionalism and civility are not inconsistent with zealous and skilled advocacy—in fact, they enhance it.

IT IS SO ORDERED.

DATED this 24th day of January, 2001.

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MARK W. BENNETT
CHIEF JUDGE, U. S. DISTRICT COURT
NORTHERN DISTRICT OF IOWA